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IN THE

Supreme Court of The United States

OCTOBER TERM, 1986

ALOHA AIRLINES, INC.,
Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

JOSEPH P. MANNERS
1300 Connecticut Avenue N.W.
Washington, D.C. 20036

HUGH HAFER*
RICHARD H. ROBBLEE
CHERYL FRENCH
2505 Third Avenue, Suite 309
Seattle, Washington 98121
(206) 728-7280

Attorneys for Respondent

**Counsel of Record*

Frayn Printing Company Seattle, Washington

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COUNTERSTATEMENT OF CASE

The relevant facts can be stated briefly. Accordingly, the Respondent offers a counterstatement of the case.

Petitioner, Aloha Airlines, Inc. (Aloha), is a common carrier under Section 201 of the Railway Labor Act. 45 U.S.C. §181. Respondent, International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), represents Aloha's clerical and mechanical employees.

Aloha and the IAM were parties to a collective bargaining agreement (Basic Agreement), which was automatically renewed on December 31 of each year unless one of the parties served a notice of intended change. In response to Aloha's financial difficulties, IAM also entered into an agreement providing for temporary wage and benefit concessions. The concession agreement was effective from April 2, 1982 through February 28, 1983.

On February 11, 1983, during negotiations regarding modifications in the Basic Agreement, Aloha notified IAM that it intended to continue to apply the concession agreement after February 28, 1983. The Railway Labor Act requires carriers to maintain status quo rates of pay, rules and working conditions during negotiations. 45 U.S.C. §156. Aloha asserted that the concession agreement was the status quo. IAM took the position that the Basic Agreement was the status quo. A grievance was filed and on June 24, 1983, Aloha refused to arbitrate.

IAM filed this suit for declaratory relief and damages on March 9, 1984. The suit alleged that Aloha breached the collective bargaining agreement and violated the status quo provisions of the Railway Labor Act when it applied the concession agreement after February 28, 1983. Aloha claimed that the suit was untimely.

The district court, relying on *res judicata* (Pet. 78a - 84a),

dismissed the suit.[1] The Ninth Circuit reversed and reached the issue of timeliness. *International Assoc. of Machinists v. Aloha Airlines, Inc.*, 790 F.2d 727, 730-733 (9th Cir. 1986); Pet. 31a - 32a. Applying this Court's holding in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Ninth Circuit held that the six month Taft Hartley Act unfair labor practice limitation period applied to the IAM's Railway Labor Act claim (790 F.2d at 733-36; Pet. 32a - 48a).

The court below declined to apply its decision retroactively. (790 F.2d at 736-37; Pet. 48a-52a) Instead, it applied the most appropriate state statute, a one year limitation period governing recoveries authorized by federal statute. (Hawaii Rev. Stat. §657-11) (790 F.2d at 736-38; Pet. 52a - 56a). The appeals court found the limitation period was tolled until June 24, 1983, the date on which Aloha notified IAM that it would not arbitrate the dispute. Consequently, the court below held that IAM's claim was timely filed on March 9, 1984 (790 F.2d at 738-39; Pet. 59a - 62a). Aloha petitioned for certiorari on the retroactivity issue.

I. THE CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE RETROACTIVITY OF DELCOSTELLO IN TAFT HARTLEY ACT HYBRID LITIGATION HAS BECOME MOOT BY PASSAGE OF TIME. A SIMILAR CONFLICT DOES NOT EXIST IN RAILWAY LABOR ACT HYBRID LITIGATION.

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) held that the six-month unfair labor practice limitations section of the Taft Hartley Act, 29 U.S.C. §160(b) should be applied to an employee's suit alleging a breach of fair representation by a union and a breach of con-

[1] IAM had previously filed a suit to compel arbitration, but that suit was dismissed. The court concluded that the case involved a "major dispute" not subject to arbitration. *International Association of Machinists, AFL-CIO v. Aloha Airlines, Inc.*, 776 F.2d 812, 816 (9th Cir. 1985).

tract by an employer. This type of suit is commonly referred to as a "hybrid" action. The fair representation doctrine was first recognized in a suit arising under the Railway Labor Act and, later on, applied to Taft Hartley Act litigation.[2]

Since the Taft Hartley Act case law borrows the Railway Labor Act fair representation case law, it is not surprising that lower courts have applied the Taft Hartley Act, *DelCostello* ruling, to hybrid cases arising under the Railway Labor Act. There is a conflict among the circuits on the retroactivity of *DelCostello* in hybrid cases arising under the Taft Hartley Act. (Pet. pp. 24-28) This Court has declined review[3] and the passage of time has mooted the conflict.

The federal courts, including the Ninth Circuit, have consistently applied this Court's Taft Hartley Act, *DelCostello*

[2] *Steele v. Louisville and Nashville R.R.*, 323 U.S. 192 (1944); *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955). The duty of fair representation was implied, thus avoiding issues otherwise created by the Railway Labor Act's grant of exclusive bargaining rights. *Steele*, 323 U.S. at 201-202.

[3] *E.g. Taylor v. Ford Motor Co.*, 761 F.2d 931 (3rd Cir. 1985), *cert denied* 474 U.S. ___, 54 U.S.L.W. 3484 (1986); *Scaglione v. Communications Workers of America, Local 1395*, 759 F.2d 201, *cert denied* 474 U.S. ___, 54 U.S.L.W. 3271 (1985); *Aragon v. Local No. 572, International Brotherhood of Teamsters*, 750 F.2d 1447 (9th Cir. 1985), *cert denied* 474 U.S. ___, 54 U.S.L.W. 3252 (1985); *Barnett v. United Airlines, Inc.*, 738 F.2d 358 (10th Cir. 1984), *cert denied* 469 U.S. 1087 (1984); *Welyczko v. U.S. Air, Inc.*, 733 F.2d 239 (2d Cir. 1984), *cert denied* 469 U.S. 1036 (1984); *Aarsvold v. Greyhound Lines, Inc.*, 724 F.2d 72 (8th Cir. 1983), *cert denied* 467 U.S. 1253 (1984); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert denied* 469 U.S. 916 (1984); *Erkins v. United Steelworkers of America, AFL-CIO*, 723 F.2d 837 (11th Cir. 1983), *cert denied*, 467 U.S. 1243 (1984); *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert denied*, 469 U.S. 916 (1984); *McNaughten v. Dillingham Corp.*, 707 F.2d 1042 (9th Cir. 1983), *cert denied*, 468 U.S. 916 (1984).

decision, to hybrid suits arising under the Railway Labor Act.[4] *Sui generis* fact patterns aside,[5] the appeals courts have consistently applied *DelCostello* to the litigants in the case before the court.

In sum, the retroactivity of *DelCostello* has been tendered to this Court. Certiorari has been denied. More than three years have elapsed since *DelCostello* was decided. Thus, the retroactivity conflict which developed in Taft Hartley Act hybrid litigation is moot. A retroactivity conflict has not developed in hybrid cases arising under the Railway Labor Act.

II THE CASES CITED IN THE PETITION DO NOT EVIDENCE A CONFLICT AMONG THE CIRCUITS IN NON-HYBRID RAILWAY LABOR ACT CASES.

Aloha cites opinions in the Second and Seventh circuits which "graphically" portray a conflict between those circuits and the court below. (Pet. pg. 32). The cited cases are *Robinson v. Pan American World Airways, Inc.*, 777 F.2d 84 (2d Cir. 1985) and *Brotherhood of Locomotive Engineers v. Atchinson, Topeka and Santa Fe Railroad Company,* 768 F.2d 914 (7th Cir. 1985).

In *Robinson* the Second Circuit applied the Taft Hartley Act six month limitation period to a suit alleging that certain

[4] *Byrne v. Buffalo Creek Railroad Co.*, 765 F.2d 364 (2d Cir. 1985); *Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188 (3rd Cir. 1984); *Triplett v. Brotherhood of Railway, Airline & Steamship Clerks, Local Lodge No. 308,* 763 F.2d 625 (4th Cir. 1985); *Brock v. Republic Airlines, Inc.*, 776 F.2d 523 (5th Cir. 1985); *Ranieri v. United Transportation Union,* 743 F.2d 598 (7th Cir. 1984); *Hunt v. Missouri Pacific Railroad,* 729 F.2d 578 (8th Cir. 1984); *Gallon v. Levin Metals Corp.*, 779 F.2d 1439 (9th Cir. 1986); *Barnett v. United Airlines, Inc.*, 738 F.2d 358 (10th Cir. 1984), *cert denied* 469 U.S. 1087 (1984).

[5] *Byrne,* 765 F.2d at 366 (Court departs from Circuit's rule applying *DelCostello* retroactively because of litigation delays, due in part to court); *Triplett,* 763 F.2d 627-28 *(DelCostello* not applied retroactively because prior West Virginia law was clear precedent on which plaintiffs had relied).

employees had been terminated on account of union activity. The *Robinson* opinion applied the Taft Hartley Act limitation period to the litigants before it but remanded, for decision in the trial court, the employee's claim that the carrier was estopped from asserting a time bar. The *Robinson* opinion does not address the prospective application issue which is the focus of the petition in this case.

In *Santa Fe* it was claimed that the carrier violated its duty to bargain ten years prior to suit by entering into a conflicting agreement with a second union. Applying the Taft Hartley Act six month limitations rule, the Seventh Circuit held the claim to be time barred. Since a ten year old claim would be barred under any conceivable limitations statute, the question of prospective application of the six month rule was not an issue.

The Second Circuit, in *Robinson,* the Seventh Circuit, in *Santa Fe,* and the Ninth Circuit, in the case at bar, applied the Taft Hartley Act six month limitations rule to a non-hybrid Railway Labor Act case. Neither the Second nor the Seventh Circuit addressed the prospective application issue tendered by the petition. Accordingly, the IAM submits that Aloha has failed to demonstrate a conflict which supports its petition.

III SINCE DELCOSTELLO IS A TAFT HARTLEY ACT CASE, ITS IMPLICATIONS SHOULD BE ADDRESSED, IF AT ALL, IN A CASE ARISING UNDER THE TAFT HARTLEY ACT.

The petition assumes that the Taft Hartley Act, *DelCostello* opinion applies to a Railway Labor Act breach of contract-status quo suit. The court below so held. However, this Court did not extend *DelCostello* to all Taft Hartley Act litigation. 462 U.S. at 171. More importantly, *DelCostello* does not concern itself with Railway Labor Act limitations problems. If the petition is granted, these areas must be addressed; otherwise, the retroactivity issue is purely hypothetical.

Taft Hartley Act suits alleging breach of contract or a violation of statute are commonplace. However, Railway Labor Act suits alleging a breach of contract or statutory violation are relatively rare.[6] The IAM respectfully suggests that the retroactivity question be addressed, if at all, in a case arising under the Taft Hartley Act.

Finally, the IAM notes that Aloha neither claims nor proves that the issue it tenders is of importance to anyone other than the parties to this lawsuit. Put differently, Aloha does not claim or prove that there are a significant group of Railway Labor Act cases which will be impacted by the prospective application of a six month limitation period to lawsuits alleging either a breach of contract or a statutory violation. Aloha's issue is retroactivity and that issue is transitory, at best.

CONCLUSION

For the foregoing reasons, the petition should be denied.

JOSEPH P. MANNERS
1300 Connecticut Avenue N.W.
Washington, D.C. 20036

HUGH HAFER
RICHARD H. ROBBLEE
CHERYL FRENCH
2505 Third Avenue, Suite 309
Seattle, Washington 98121
(206) 728-7280

Attorneys for Respondent

October 6, 1986

[6] We note 24 such cases decided since January 1, 1986 under the Taft Hartley Act (Appendix A, *infra*, pg. 7) but only 3 such cases under the Railway Labor Act during the same time frame (Appendix B, *infra*, pg. 8).

APPENDICES

Appendix A

Railway Labor Executives Assoc. v. Staten Island Railroad Corp., __ F.2d __, 122 LRRM 2939 (2d Cir. 1986) (Union's action alleging violation of status quo provisions of RLA dismissed)

Southern Pacific Transportation Co. v. Brotherhood of Railway, Airline and Steamship Clerks, __ F. Supp. __, 121 LRRM 3541 (D. Utah 1986) (Suit by Union seeking injunctive relief for violation of status quo provisions of RLA)

Grosschmidt v. Chantanqua Airlines, Inc., __ F. Supp. __, 122 LRRM 3254 (N.D. Ohio 1986) (Employee's suit alleging employer violated RLA by discharging her for union activities)

Cases compiled from BNA Labor Relations Reporter, Digest Sections LR 103.301, 103.305, 103.48 and 103.703. Duty of fair representation cases, cases reviewing arbitration board decisions and cases holding courts have no jurisdiction over "minor disputes" are excluded.

Appendix B

AT&T Technologies v. Communications Workers of America, 475 U.S. —, 89 L.Ed. 2d 648 (1986) (Union's suit under §301 to compel employer to arbitrate grievance.)

Sheet Metal Workers Local 57 Welfare Fund, et al v. Tampa Sheet Metal Co., Inc., 786 F.2d 1459 (11th Cir. 1986) (Employee benefit trusts' suit for breach of contract, alleging employer failed to make required trust contributions.)

United Brotherhood of Carpenters and Joiners of America, 787 F.2d 953 (4th Cir. 1986) (Union's suit under §301 to compel employer to arbitrate grievance.)

Local Union No. 370 of the Int'l Union of Operating Engineers v. Morrison - Knudsen Co., Inc., — F.2d —, 122 LRRM 2558 (9th Cir. 1986) (Union's suit under §301 to compel employer to arbitrate grievance.)

Int'l Association of Machinists & Aerospace Workers, Local Lodge No. 1688 v. Allied Products Corp., 786 F.2d 1561 (11th Cir. 1986) (Union's suit under §301 to compel employer to arbitrate grievance.)

In re Woodcrest Nursing Home v. Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, S.E.I.U., AFL-CIO, 788 F.2d 894 (2d Cir. 1986) (Union's suit under §301 to compel employer to arbitrate grievance.)

Sun-land Nurseries, Inc. v. Southern California District Council of Laborers, et al, — F.2d —, 122 LRRM 2921 (9th Cir. 1986) (Employer's suit alleging violation of NLRA §8(e) prohibition of "hot cargo" agreements.)

Moldovan, et al v. The Great Atlantic and Pacific Tea Co., Inc., — F.2d —, 122 LRRM 2762 (3rd Cir. 1986) (Employee benefit trust's suit for breach of contract alleging failure to make required contributions.)

Operating Engineers Pension Trust v. Giorgi, 788 F.2d 620 (9th Cir. 1986) (Employee benefit trust's suit for breach of contract, alleging failure to make required contributions.)

Crest Tankers, Inc., et al v. National Maritime Union of America, __ F.2d __, 122 LRRM 3237 (8th Cir. 1986) (Employer's suit for declaratory relief, seeking to avoid union's attempt to require it to arbitrate dispute under contract.)

Local 257, Int'l Brotherhood of Electrical Workers, AFL-CIO v. Grimm Electric, 786 F.2d 342 (8th Cir. 1986) (Employee benefit trusts' action for breach of contract.)

R. B. Electric, Inc. v. Local 569, Int'l Brotherhood of Electrical Workers, AFL-CIO, __ F.2d __, 121 LRRM 3123 (9th Cir. 1986) (Employer's suit for declaratory judgment seeking to avoid duty under collective bargaining agreement to arbitrate grievance.)

Teamsters Union Local 315 v. Great Western Chemical Co., 781 F.2d 764 (9th Cir. 1986) (Union's suit under §301 to compel employer to arbitrate grievance.)

Emery Air Freight Corp. v. Local Union 295, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, 786 F.2d 93 (2d Cir. 1986) (Employer's suit for declaratory judgment seeking to avoid duty under collective bargaining agreement to arbitrate grievance.)

Truex, et al v. Garrett Freightlines, Inc., 784 F.2d 1347 (9th Cir. 1986) (Employees' suit against employer under §301 for breach of contract.)

United Steelworkers of America, et al v. Deutz-Allis Corp., __ F. Supp. __, 122 LRRM 2035 (W.D. Mo. 1986) (Union's suit under §301, to establish that successor employer is bound by collective bargaining agreement.)

Bakery, Confectionary and Tobacco Workers Union, Local 19 v. Ryan's I.G.A., __ F. Supp. __, 122 LRRM 3333 (N.D. Ohio 1986) (Union's suit for declaratory judgment under §301, alleging that contract applies to successor employer.)

Chicago District Council of Carpenters Pension Fund v. Strom, ___ F. Supp. ___, 122 LRRM 2770 (N.D. Ill. 1986) (Employee benefit trusts' suit against employer for failure to pay trust contributions required under contract.)

United Steelworkers of America, AFL-CIO, CLC, Local 65, et al v. United States Steel Corp., ___ F. Supp. ___, 122 LRRM 3366 (N.D. Ill. 1986) (Union's suit against employer under §301 for breach of contract.)

Greater New Orleans Stage, Motion Picture, Television and Exhibition Employees Local 39 v. W.H. Bower Spagenberg Inc., et al, ___ F. Supp. ___, 122 LRRM 3305 (E.D. La. 1986) (Union's suit against employer for breach of contract and failure to bargain in good faith.)

Davis v. Monsanto Co., ___ F. Supp. ___, 121 LRRM 2698 (S.D. W. Va. 1986) (Employee's suit against employer under §301 for breach of contract.)

Trumbauer v. Group Health Cooperative of Puget Sound, ___ F. Supp. ___, 122 LRRM 2384 (W. D. Wa. 1986) (Employee's suit, treated by court as breach of contract claim under §301, alleging discharge "without cause.")

K & M Glass Co., Inc. v. Int'l Brotherhood of Painters and Allied Trades Union, et al, ___ F. Supp. ___, 121 LRRM 3005 (N.D. Calif. 1986) (Employer's suit for declaratory judgment, seeking to avoid claim by employee benefit trusts for trust contributions owed under collective bargaining agreement.)

Nelms v. Gold Kist, Inc., ___ F. Supp. ___, 121 LRRM 3183 (N.D. Ala. 1986) (Employee's suit against employer for breach of contract.)

Cases compiled from BNA Labor Relations Reporter, Digest Sections LR 24.05 - 24.909. Duty of fair representation cases, cases to enforce an arbitration award and cases reviewing an NLRB order are excluded.